IN THE

Supreme Court of the United States

October Term, 1960

No. 84

In the Matter

of

ALBERT MARTIN COHEN, an attorney,

Petitioner,

—v.—

DENIS M. HURLEY,

Respondent.

BRIEF ON BEHALF OF THE NEW YORK STATE ASSOCIATION OF PLAINTIFFS' TRIAL LAWYERS AS *AMICUS CURIAE*

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Interest of the *Amicus Curiae*

The *amicus curiae* is a self-governing bar association consisting of New York lawyers who practice in the various fields of personal injury law. It is the New York affiliate of the National Association of Claimants' Compensation Attorneys.

The *amicus curiae* believes that the judgment below constitutes a serious impairment of the right to engage in the practice of law and a deprivation of the constitutional rights of lawyers. The *amicus curiae* submits this brief with the consent of the attorneys for both parties.

Statement of Facts

Petitioner was subpoenaed to appear with his books and records in an "ambulance-chasing" inquiry directed to be held by the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York. No charges were filed against him. No witnesses testified against him.

Petitioner asserted his constitutional privilege against self-incrimination in declining to answer certain questions put to him and in declining to produce his books and records. The Appellate Division, while agreeing that the petitioner was entitled to assert his constitutional privilege against self-incrimination, deemed the refusal to answer and produce the aforesaid records to be a violation of his duty as a member of the Bar. Accordingly, one judge dissenting, the Court disbarred him. The Court of Appeals affirmed the order of disbarment, Judge Fuld dissenting.

POINT I

Petitioner was denied due process and subjected to an unlawful search and seizure in violation of the Fourteenth Amendment in being summoned to appear and produce his records in an inquiry directed at him but without formal charges and witnesses subject to cross-examination.

In the view of the *amicus curiae*, this case presents a problem which might well be considered prior to consideration of the issue raised by the assertion of the constitutional privilege: Was petitioner denied the fair treatment required by the due process clause of the federal Constitution and subjected to an unlawful search and seizure in violation of it?

A lawyer who is the subject of a judicial investigation should not be called upon to give an accounting in the absence of formal charges supported by the testimony of witnesses subject to the protective device of cross-examination. A generalized inquiry of this sort is historically termed an inquisition. Its only modern successor is the grand jury before which the State of New York may not call a prospective defendant as a witness. *People* v. *Steuding*, 6 N. Y. 2d 214; *People* v. *Gillette*, 111 N. Y. Supp. 133 (App. Div., 1st Dep't).

The profession of the law is too valuable to be placed in jeopardy by such loosely operating procedures. There are few professions and no occupations in which the consequences of occupational expulsion are so devastating. Public disgrace, loss of livelihood and expulsion from the profession which has constituted his life's work are the disbarred lawyer's fate. See *Bradley* v. *Fisher*, 13 Wall (80 U. S.) 335, 355. Even the most routine of work, tangentially connected with legal practice, is forbidden to the disbarred lawyer. Drinker, *Legal Ethics* (1953), pp. 51 *et seq.*

This is not to question the desirability of the highest standards of behavior. There is nothing inconsistent in requiring both high standards of the professional man and strict proof and fair procedures of his prosecutors and judges. *Cf. Ex parte Secombe*, 19 How. (60 U. S.) 9, 13; *Ex parte Garland*, 4 Wall (71 U. S.) 333, 379.

Until recently, no lawyer in New York was required to defend his professional status and reputation except after precise charges of wrongdoing supported by evidence. See, *e.g.*, *Matter of Brewster*, 12 Hun 109; *Matter of Eldridge*, 82 N. Y. 161; *Matter of Kaufman*, 245 N. Y. 423; *Matter of Brooklyn Bar Association*, 92 App. Div. 612; see also *Ex parte Wall*, 107 U. S. 265. The state has always had the burden of showing impropriety. *In re Spencer*, 206 App. Div. 806 (no opinion). That was equally true in the

United States generally. See *e.g.*, *In re. Brown*, 389 Ill. 516, 524, 59 N. E. 2d 855, 858.

In 1928 the Appellate Divisions of the First and Second Departments of the Supreme Court of the State of New York made a drastic departure from settled procedures throughout this country by authorizing a general inquiry upon *ex parte* applications of the Bar Associations. *Matter of Bar Ass'n of City of N. Y.*, 222 App. Div. 580 (1st Dept.); *Matter of Brooklyn Bar Ass'n*, 223 App. Div. 149 (2nd Dept.). In 1928 the New York Court of Appeals gave its approval to contempt proceedings which enforced such a general inquiry. *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465.

We share the concern shown for high professional standards of behavior by Chief Judge Cardozo in the *Karlin* case. But we submit, with all deference, that neither history, nor necessity nor the Constitution and statutes referred to in that decision justify approval of the inquisitorial process.

Chief Judge Cardozo relied in large part on the supervisory control of the Bar exercised in England. This was developed earlier by the New York Court of Appeals in *Matter of Rouss*, 221 N. Y. 81. But the *Rouss* case involved standards, not procedures. The historical references in that case do not support the procedure approved in *Karlin*. That case involved the contempt power of the Court, not the drastic measure of disbarment. The distinction between the two is well settled. See, *e.g.*, *People ex rel. Elliott* v. *Green*, 7 Colo. 237, 247-48. Finally, as Judge Fuld points out below, "that case did not involve a claim of privilege; the attorney simply refused to be sworn or testify" (R. 91).

Nor do we believe that the generalized "power and control" given to the courts by the Judiciary Law, § 88, sub. 2 is authority for the quasi-grand jury procedure in-

volved herein. Whatever may have been the reasoning in 1928, when *Karlin* was decided, we have advanced considerably in our conception of fair procedures which, as we have been increasingly told, are the earmarks of a civilized community. See *e. g.*, *McNabb* v. *United States*, 318 U. S. 332; *Mallory* v. *United States*, 354 U. S. 449.

While it is clear that a judicial inquiry of this nature will not be invalidated if those rigid formalities required in a criminal case are not present, it is equally clear that such an inquiry lacks even the minimum due process given to citizens in their private capacity if the attorney involved is not apprised of the charges against him. *Matter of Eldridge*, 82 N. Y. 161; *In re Claiborne*, 119 F. 2d 647; *United States* v. *Hicks*, 37 F. 2d 289. The last cited case held that an attorney in a disbarment proceeding "must be informed in advance of the purpose of the proceeding and of the grounds therefor and must be afforded a fair opportunity to interrogate the witnesses testifying against him and to produce evidence in refutation on rebuttal. These are indispensable requirements."

This court has recognized that the right to practice law may not be taken away in the absence of procedural due process. *Ex parte Robinson*, 19 Wall. (86 U. S.) 505, *Goldsmith* v. *Board of Tax Appeals*, 270 U. S. 117. See also *In re Carter*, 177 F. 2d 75, *cert. den.*, 338 U. S. 900. In the *Robinson* case the Court quoted from *Ex parte Garland*, 4 Wall. 333, that "they hold office during good behavior, and can only be deprived of it for *misconduct ascertained or declared* by the judgment of the court after opportunity to be heard has been afforded" (italics added).

One need not have the skepticism of such eminent lawyers as A. A. Berle, Jr. [*The Legal Profession*, *Encyclopedia of the Social Sciences*, (1937) Vol. XI, p. 343] or the late Charles Curtis [*It's Your Law* (1954)] to question the propriety of short cuts to enforcement of the

Canons of Ethics. The dangers of oppressive charges by disgruntled clients, jealous competitors or counsel with opposing interests are too great to justify such procedures. While it is true that judges, not laymen, sit in judgment, power in any one is a heady thing. Nothing that we have read of the actual procedures in these ambulance-chasing investigations can endear them to those who believe in due process. See, *e. g.*, the Record on Appeal in *People ex rel. Karlin* v. *Culkin, supra.* Finally, if this treatment is to be accorded members of the Bar, the medical profession, architects, see *e. g., Florida State Board of Architecture* v. *Seymour*, 62 So. 2d 1, and many other professional groups can be subjected to equally drastic treatment. For all licensing boards and professional societies may insist with equal force both upon high professional standards and inquisitorial means of achieving them? A recent study of the general problem of licensing points up the dangers of such arbitrary control over the livelihood of others. Gellhorn, *Individual Freedom and Governmental Restraints* (1956), chap. 3, pp. 105-151.

Due process requires confrontation, cross-examination and a fair trial. *Peters* v. *Hobby*, 349 U. S. 331; *Matter of Murchison*, 349 U. S. 133. See also *United States* v. *Minker*, 350 U. S. 179, 188, on the "safeguards of a public adversary proceeding". If prospective lawyers are entitled to due process under the Fourteenth Amendment, *Konigsberg* v. *California*, 353 U. S. 252; *Schware* v. *New Mexico*, 353 U. S. 232, how can it be denied those sought to be ousted from the profession? We therefore agree wholeheartedly with the dissenting opinions of Mr. Justice Kleinfeld in the Appellate Division (R. 78) and of Judge Fuld in the Court below (R. 87).

The argument made above is applicable both to the oral inquiry of petitioner and the *subpoena duces tecum* directed to his books and records. In the latter respect the order below is subject to the additional criticism that it is an

unlawful search and seizure forbidden by the Fourteenth Amendment to the Constitution. See *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *Ellis* v. *United States*, 206 U. S. 246; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1.

Surely the record in this case does not show "misconduct ascertained and declared". It is bare both of charges and of evidence. A disbarment predicated upon so empty a record is a denial of due process of law.

POINT II

Petitioner's disbarment for asserting his constitutional privilege denied him due process and equal protection under the Constitution.

The constitutional provision against self-incrimination was adopted by New York State in 1821 and repeatedly implemented by the decisions of courts in every possible variety of circumstances. *Matter of Ellis*, 282 N. Y. 435; *Matter of Grae*, 282 N. Y. 428; *cf*, *Matter of Levy*, 229 App. Div. 62 (*dictum*), aff'd 255 N. Y. 223; *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465; *Matter of Schneidkraut*, 231 App. Div. 109; *Matter of Solovei*, 250 App. Div. 117, aff'd 276 N. Y. 647; *People* v. *Kaffenburgh*, 188 N. Y. 49; *Matter of Cohen*, 115 App. Div. 900 (opinion withheld from publication by direction of the Court).

The first Constitution of the State of New York following the ratification of the federal Constitution contained an unconditional guarantee of the privilege against self-incrimination. The present Constitution contains an equally explicit provision. Article I, § 6, provides: "• • • nor shall he be compelled in any criminal case to be a witness against himself."

The only persons upon whom the State Constitution places a disability for assertion of the privilege are state

employees who assert it or refuse to waive immunity in a grand jury investigation concerning their work. Lawyers are not employees of the state and the proceeding below was not a grand jury investigation. Therefore the disability does not apply to petitioner although the Court below acted as if it did.

It would be a work of supererogation to cite to this Court the numerous cases not involving lawyers in which the Courts below have applied in the most liberal spirit the constitutional privilege against self-incrimination. We deem it sufficient to limit our discussion here to cases involving lawyers. These may be divided into four classes.

The first type of case, illustrated by *People* v. *Kaffenburgh*, 188 N. Y. 49, involved the lawyer's reliance upon the privilege when called as a witness upon the criminal trial of another. In that case, as here, it was argued that as an officer of the Court the lawyer had a responsibility for the administration of justice and should be required to choose between his profession and self-protection. The Court of Appeals unanimously disagreed, taking the position that lawyers were fully entitled to the protection of the privilege without imposition of penalty or disability. The same rule was applied by the Appellate Division of the Supreme Court, upon the authority of *Kaffenburgh*, to a lawyer who refused to waive immunity before a grand jury investigating a murder. *Matter of Solovei*, 250 App. Div. 117 (2nd Dep't), aff'd 276 N. Y. 647.

The second type of case involved the lawyer in an "ambulance-chasing" inquiry who failed to assert his privilege (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465) or to assert it in good faith (*Matter of Levy*, 255 N. Y. 223). In the first case the Court below declared Karlin's duty to testify "subject to his claim of privilege if his answer would expose him to punishment for crime" (248 N. Y. at 471). In the second case it noted that Levy's "claim was

a mere pretext to avoid giving non-incriminatory answers" (255 N. Y. at 225).

It is significant that the Appellate Division shortly thereafter interpreted *Matter of Levy* as holding that the assertion in good faith of the privilege is not ground for disbarment. *Matter of Solovei*, 250 App. Div. 117 (2d Dept. 1937), aff'd 276 N. Y. 647.

In the third type of case, involving an investigation similar to the present one, the witness asserted his constitutional privilege and refused to waive immunity. There the Appellate Division made the same argument it has repeated below, *Matter of Ellis*, 258 App. Div. 564. But the Court of Appeals adopted the dissenting opinion of Presiding Justice Lazansky, 258 App. Div. 574, in which he stated the historic significance of the privilege, *Matter of Ellis*, 282 N. Y. 435. So too in *Matter of Grae*, 282 N. Y. 428; *Matter of Schneidkraut*, 231 App. Div. 109 and *Matter of Solovei*, 250 App. Div. 117, aff'd 276 N. Y. 647.

There is no distinction in principle or practical effect between the assertion of the privilege and the refusal to waive immunity. In both cases there is the refusal to cooperate with the authorities in the legitimate interest of self-protection. Indeed the state admitted this identity in its brief in *Matter of Grae, supra*, where it said that it makes "very little distinction between the refusal of a lawyer to waive immunity in a proceeding of this kind and resort by a lawyer to his privilege against self-incrimination" (Petitioner-Respondent's Brief, p. 10, in *Matter of Grae, supra*).

Similarly, in *Matter of Solovei*, 250 App. Div. 117, aff'd 276 N. Y. 647, involving a refusal to waive immunity, the Appellate Division expressly relied upon the decision in *People* v. *Kaffenburgh*, 188 N. Y. 49, involving the assertion of privilege.

The fourth class consists of disciplinary proceedings instituted against lawyers upon the basis of formal charges.

The *amicus curiae* is aware of no case in New York in which, even with the added protection of formal charges, a lawyer was compelled to testify. It is only a failure to refute the evidence against him which is regarded as significant. *Matter of Randel*, 158 N. Y. 216.

The great weight of authority, particularly the recent cases in other jurisdictions, supports this position of the *amicus curiae*. In one of the earlier cases, *State ex rel. Reynolds* v. *Circuit Court*, 193 Wis. 132, 144, the Court required a lawyer to be sworn but added: "If in the course of his examination questions were asked that tended to incriminate him, Mr. Rubin could then claim his privilege." This case was relied upon by the Bar Association whose petition resulted in the decision in *Matter of Brooklyn Bar Association, supra*, and *Matter of New York City Bar Association, supra*.. See similarly, *In re Vaughan*, 189 Cal. 491, 497.

The most notorious effort in recent years to undercut the constitutional privilege of lawyers was attempted and failed in Florida. In *Sheiner* v. *State*, 82 So. 2d 657, the Supreme Court of Florida held that refusal to answer questions concerning Communist Party membership in disbarment proceedings was protected by the privilege. The decision is particularly significant because the Court also agreed that membership in the Communist Party forfeited the right to practice law (82 So. 2d at 659). But the Court observed that if lawyers were required to surrender the constitutional privilege, other constitutional rights including the right to oppose an unlawful search and seizure would also be in jeopardy.

In *Petition for Revision of or Amendment to Integration Rule of Florida Bar*, 103 So. 2d 873, the same Court refused to make a refusal to answer questions a ground for disciplinary action. To the same effect: *In re Holland*, 377 Ill. 346, 36 N. E. 2d 543.

The decision below is particularly questionable since it comes in the wake of unsuccessful proposals for legislation with the same objective. In 1953, the *Committee on Law Reform* of the Association of the Bar of the City of New York opposed "the enactment of a statute subjecting lawyers to disbarment proceedings if they refused to sign waivers when called before a court of competent jurisdiction to testify concerning their conduct as lawyers or performance of their duties as members of the Bar" (Report No. 2029, April 22, 1953). In answer to the argument made by the Court below (R. 86) that the lawyer had a constitutional privilege as a citizen but not as a lawyer, this Committee aptly noted that "these laborious distinctions show how hard it is to split the human personality in any precise way for jurisdictional purposes" (Report No. 2929, p. 3).

Two years later the Association's *Special Committee on the Matter of Communist Lawyers* made a Report relevant to our subject (Report No. 2723, Nov. 29, 1955). Although it regarded Communist activities as inconsistent with the lawyer's professional obligations, it stated that "to make the refusal to testify the sole ground for disbarment might well be unconstitutional and certainly contrary to the decisions of the Court of Appeals. *Matter of Grae*, 282 N. Y. 428, and *Matter of Ellis*, 282 N. Y. 435", *Id.* at p. 10. It is not without significance that the last two cited cases were interpreted by this impartial committee in the manner suggested by the *amicus curiae*. The Report was adopted by the Association at its stated meeting of January 17, 1956.

We submit that at no time since the emergence of the constitutional privilege against self-incrimination in Anglo-American jurisprudence has a lawyer's assertion in good faith of the constitutional privilege been deemed ground for disciplinary action. No judicial decision, no authoritative text suggests that the lawyer has surrendered his constitutional rights upon being admitted to the Bar. See

e.g. Drinker, *supra*, pp. 42, 303-308, Thornton, *A Treatise on Attorneys at Law* (1914) *passim*. No canon of ethics or implementing administrative opinion has so held or advised. See *e.g. Opinion of the Committee on Professional Ethics and Grievances* (American Bar Ass'n. 1957) *passim*. Therefore, as the Court below elsewhere said:

> "It is a just inference that our alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period never in fact had an existence."
>
> *McGuigan* v. *D. O. & W. R. R. Co.*, 129 N. Y. 50, 56.

The question which must occur after the foregoing recital is how the Court below concluded that petitioner could be disbarred.

The foundation of its argument was its reference to *Matter of Rouss*, 221 N. Y. 81, where it was held that membership in the bar is a privilege based upon good character. As we have previously noted, *supra*, page 4, *Matter of Rouss* involved a disbarment based upon revelation of crime, not an attempt to compel a choice between surrender of the privilege and loss of membership in the Bar. While we most respectfully differ with the view expressed therein that disbarment is neither penalty nor forfeiture, that issue is not in the present case and will not be discussed herein.

The next point made, is that a lawyer has a "special position" with the duty of "loyal cooperation" in judicial investigations (R. 85). None of the cases cited by the Court below involve assertion of the constitutional privilege. The duty of "loyal cooperation" plainly must yield to other common law and statutory rules such as the attorney-client and marital privileges. A constitutional right is entitled to equal deference.

Analysis of the problem is not advanced by talking in terms of obligation rather than privilege. The lawyer's

obligation to the administration of justice is no greater here than in *Matter of Solovei*, 276 N. Y. 647 and *People* v. *Kaffenburgh*, 188 N. Y. 49. In each case the issue is whether the ground of declination is legally justified. It is only where, unlike here, the Constitution itself withdraws its absolute protection (*Canteline* v. *McClellan*, 282 N. Y. 166), that the obligation becomes relevant and a disability may be imposed.

Matter of Grae, supra, and *Matter of Ellis, supra,* are interpreted by the Court below as authorizing the refusal to waive immunity, not the assertion of the privilege itself. We have already shown that there is no distinction between the two (*supra*, p. 9). So narrow a view of these decisions is inconsistent with that Court's discussion in *Grae* and *Ellis* of the meaning and importance of the constitutional privilege.

The Court below also notes that *Grae* and *Ellis* had "offered to answer all pertinent questions" (R. 87). We do not believe that this changes the situation. For had their offer to testify been accepted, they would have achieved immunity from prosecution, precisely the result achieved by appellant herein by his assertion of privilege. See Judge Fuld's dissenting opinion below (R. 89).

Lerner v. *Casey*, 2 N. Y. 2d 355, aff'd 357 U. S. 468, relied upon below, does not support the decision below, for the following principal reasons: (1) *Lerner* involved public employment which historically is subject to governmental control, *cf. Cammer* v. *United States*, 350 U. S. 399, 405; (2) such employment may be terminated by quasi-judicial procedures, whereas disbarment requires a judicial procedure, *Ex parte Robinson*, 19 Wall. (86 U. S.) 505, 508; *Matter of Eldridge, supra; Matter of Percy*, 36 N. Y. 651; *Matter of Anonymous*, 22 Wend. 656; *In re Att'y*, 83 N. Y. 164; *Matter of Joseph*, 125 App. Div. 544; (3) in *Lerner*, unlike here, a statute explicitly authorized the procedure

followed; (4) Lerner was held to have waived his claims as to lack of procedural due process by failing to exhaust his administrative remedy; (5) this Court deemed the State justified in the drastic action because of problems relating to national security.

To impose disbarment under the circumstances here described nullifies the constitutional privilege under Article I, § 6. It directly contradicts all that this Court has said about the constitutional privilege in *Ullmann* v. *United States*, 350 U. S. 422, *Slochower* v. *Board of Education*, 350 U. S. 551, and *Grunewald* v. *United States*, 353 U. S. 391. The lawyer, who alone among persons not employed by the government, is expelled from his profession, therefore is denied the equal protection to which he is entitled under the Fourteenth Amendment. A judicial rule penalizing use of the privilege is as much a denial of due process as it was in the *Slochower* case, where it resulted from legislative enactment. In both cases there is lacking the "protection of the individual against arbitrary action" which Mr. Justice Cardozo characterized as the very essence of due process, *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302. *Slochower* v. *Board of Higher Education*, 350 U. S. at 559.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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